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No. 77-768

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE COUNTY OF COOK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the court of appeals (Pet. App. 1a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1977. The petition for a writ of certiorari was filed on November 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal tax lien, notice of which was filed with the Cook County Recorder of Deeds, was effective against subsequent purchasers and mortgagees of property of the taxpayer against whom the lien was filed.

STATUTES AND RULE INVOLVED

The pertinent portions of Section 6321, 6322, and 6323 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Rule 35 of the Local Rules of the United States Court of Appeals for the Seventh Circuit, are set forth in the Appendix, *infra,* pp. 1a-7a. Ill. Ann. Stat., ch. 30, § 127 (1965), and ch. 82, § 66 (1966), and Ill. Ann. Stat., ch. 30, § 127 (1969), and ch. 82, § 66 (Cum. Supp. 1977), are set forth at pp. 5-6 of the petition.

STATEMENT

Pursuant to the Tax Court's decision in *Davis* v. *Commissioner,* decided September 18, 1964 (23 T.C.M. 1449), the Commissioner of Internal Revenue issued an assessment against Anne Davis for taxes amounting to $16,905.92, plus interest. On March 29, 1966, the Service filed a notice of federal tax lien against Davis in the office of the Recorder of Deeds of Cook County, Illinois. Davis and Mary Ginsberg owned, as tenants in common, a parcel of real property in Cook County (Pet. 7). That real estate was registered under the Torrens Act of 1897, Ill. Ann. Stat., ch. 30, § 45 (1969), prior to the filing of the tax lien. On December 1, 1967, Davis and Ginsberg conveyed the property to John and Rosa L. Neal. Minnesota Mutual Life Insurance Company obtained an assignment of the mortgage incurred by the Neals as a result of the transfer (Pet. App. 2a-3a).

On March 11, 1971, the government brought this action in the United States District Court for the Northern District of Illinois to foreclose its tax liens against the property. The Neals and Minnesota Mutual Life Insurance Company filed third-party complaints against petitioners County of Cook and its Registrar of Titles seeking indemnification for any loss suffered as a result of the foreclosure. The district court held: (1) that the government's notice of federal tax lien had been filed in the proper office at the time that Neals and Minnesota Mutual Life Insurance Company, as purchasers and mortgagee, respectively, perfected their interests in the property so that the lien was effective against their interest; and (2) that the Neals and Minnesota Mutual Life Insurance Company were entitled to indemnification, including attorneys' fees, from the County of Cook, pursuant to Ill. Ann. Stat., ch. 30, § 138 (1969). The court of appeals affirmed by order (Pet. App. 1a-10a).

ARGUMENT

1. The United States has a statutory lien "upon all property and rights to property, whether real or personal," of any person liable for a tax who, after demand, fails to pay it. Section 6321, Internal Revenue Code of 1954, Appendix, *infra,* p. 2a. The tax lien arises when the assessment is made. Section 6322, Appendix, *infra,* p. 2a. At the time that the notice of tax lien was filed in this case, Section 6323(a), Appendix, *infra,* p. 3a, provided that the federal tax lien was not valid against certain persons, among whom were purchasers and mortagees, unless notice thereof was filed "in the office designated by the law of the State * * * in which the property subject to the lien is situated, whenever the State * * * has be law designated an office * * * for filing of such notice," or "in the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State * * * has not by law designated an office * * * for such filing."

In light of these statutory provisions, the court below correctly held (Pet. App. 8a) that while a state could designate the office for filing the notices of federal tax liens, it could not require the Internal Revenue Service to

file such notices in more than one office. Where more than one office was designated by the state for filing such lien notices, the Internal Revenue Service need file them in only one of the available state offices.

Here, the Illinois statute (Ill. Ann. Stat., ch. 82, § 66 (1966)) provided that the notices were to be filed in the office of the recorder of deeds for the county in which the property was located, but that notices of liens relating to Torrens property were to be filed with the registrar of titles. Since Illinois had designated an office (recorder of deeds) specifically for federal tax lien notices, the further provision with respect to Torrens property was of no effect under the then-applicable Section 6323(a).[1] Indeed, in *United States* v. *Rasmuson,* 253 F. 2d 944, the Eighth Circuit likewise held ineffective the provisions of Minnesota law requiring special filing requirements for Torrens property as they applied to notices of tax liens.[2]

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[1]Subsequent to the filing of the federal tax lien notice and prior to the obtaining of any interest in the property by the Neals and Minnesota Mutual Life Insurance Company, Section 6323 of the Code was amended by Section 101(a), Federal Tax Lien Act of 1966, 80 Stat. 1125, to provide that the federal tax lien notice was to be filed (1) in the state designated office and (2) if more than one state office or no state office was designated in the appropriate federal district court clerk's office. See Section 6323(f) of the Code (Pet. 3). The Illinois law (Ill. Ann. Stat., ch. 30, § 127, and ch. 82, § 66 (1966)) (Pet. 5-6) was likewise amended to provide that federal tax lien notices were to be filed in only the office of the recorder of deeds. Thus, at the time of filing the tax lien notice as well as the time that the Neals and the Minnesota Mutual Life Insurance Company acquired their interest in the property, the tax lien notice was at all times filed in the appropriate office, *viz.*, the office of the recorder of deeds.

[2]The recorder of deeds, is also the registrar of titles (Ill. Ann. Stat., ch. 30, § 45 (1969)), did not refuse to accept the federal tax lien notices for filing. Prior to the effective date of the amendments of the Federal Tax Lien Act of 1966, 80 Stat. 1125, the Internal Revenue Service had filed its lien notices in Cook County with the recorder of deeds. See, *e.g., United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, reversing *per curiam*, 227 F. 2d 359 (C.A. 7); *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N.E. 2d 172. Cook County is apparently the only Illinois county that used the Torrens system—and this was optional. See Rev. Proc. 67-15, 1967-1 Cum. Bull. 592.

Petitioners argue (Pet. 11-17): (1) that the federal law in effect at the time of the filing of the federal tax lien notice allowed the states to require filing of such notices with respect to real property in more than one county office; or (2) that if more than one office was designated by the states for filing federal tax lien notices with respect to real property, then they were required to be filed in the appropriate federal district court clerk's office.

But the legislative history of Section 6323 of the Code clearly indicates that the states could not impose excessive procedural burdens upon the federal government with respect to filing federal tax lien notices. *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291, 295-296; H.R. Rep. No. 1018, 62d Cong., 2d Sess. 2 (1912). Indeed, when Congress amended Section 6323 by the Federal Tax Lien Act of 1966, it specifically stated its intention to continue the requirement that the Internal Revenue Service file its federal tax lien notice in one state-designated office. The 1966 Act added the provision that when a state designated more than one office, the federal tax lien notice was to be filed in the appropriate federal district court clerk's office. S. Rep. No. 1708, 89th Cong., 2d Sess. 10 (1966). However, prior to the 1966 Act, if a state provided more than one office in which notices of federal tax liens could be filed, it would file tax lien notices in one of those offices that would accept them, and not in the federal district court clerk's office.[3]

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[3]Between the time that the 1966 Federal Tax Lien Act became effective (November 2, 1966) and the effective date (July 1, 1967) of the change in the Illinois law to provide for filing of federal tax lien

2. Petitioners further contend (Pet. 19-21) that the court of appeals improperly failed to publish its opinion. Rule 35 of the Local Rules of the United States Court of Appeals for the Seventh Circuit, Appendix, *infra*, pp. 4a-7a, was adopted pursuant to the resolution of March 16, 1964, (*Annual Report of the Proceedings of the Judicial Conference of the United States* 11 (1964)). Similar rules have been adopted by the First Circuit (Rule 14), Fourth Circuit (Rule 18), Fifth Circuit (Rule 21), Sixth Circuit (Rule 11), Eighth Circuit (Rule 14), Ninth Circuit (Rule 21) and Tenth Circuit (Rule 17). See *National Labor Relations Board* v. *Amalgamated Clothing Workers of America, AFL-CIO, Local 990*, 430 F. 2d 966 (C.A. 5); *Jones* v. *Superintendent, Virginia State Farm*, 465 F. 2d 1091 (C.A. 4); *United States* v. *Baynes*, 548 F. 2d 481 (C.A. 3). The purpose of the Judicial Conference's resolution and the adoption of these local rules was to reduce the number of published opinions in cases where, as here, a controlling statute governs the case. This Court has indicated that the courts of appeals have great latitude in determining whether to issue opinions. *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 4. Since petitioners had an opportunity under Local Rule 35(d)(3) to move to have the opinion published and failed to do so, there is no basis for further consideration of the question by this Court. Moreover, petitioners have not shown that they were injured by the non-publication of the opinion.

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notices only in the office of recorder of deeds (Ill. Ann. Stat., ch. 30, § 127 (1969), and ch. 82, §§66 and 70 (Cum. Supp. 1977)), the Internal Revenue Service was required to file its tax lien notices in the clerk's office of the federal district court having jurisidiction over Cook County. See Rev. Proc. 67-15, 1967-1 Cum. Bull. 592; Rev. Proc. 68-1, 1968-1 Cum. Bull. 741.

CONCLUSION

The petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

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JANUARY 1978.

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[4]We do not address question two in the petition, *i.e.*, whether the court of appeals correctly held that under Illinois law petitioners were liable for attorneys' fees to the Neals and Minnesota Mutual Life Insurance Company.

DOJ-1978-01

APPENDIX

INTERNAL REVENUE CODE OF 1954 (26 U.S.C. (1964 ed.)):[1]

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323 [as amended by Section 236(c)(1), Revenue Act of 1964, 78 Stat. 128]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien without Notice.*—Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the

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[1]These provisions were effective until November 2, 1966.

lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

* * * * *

INTERNAL REVENUE CODE OF 1954 (26 U.S.C. (1970 ed.)):[2]

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322 [as amended by Section 113(a), Federal Tax Lien Act of 1966, 80 Stat. 1146]. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323 [as amended by Section 101(a), Federal Tax Lien Act of 1966, 80 Stat. 1125]. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

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[2]Section 6321 is effective during all the years covered by the Internal Revenue Code of 1954. Sections 6322 and 6323 are effective since November 2, 1966.

(a) *Purchases [Purchasers], Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.*—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

* * * * *

(f) *Place for Filing Notice; Form.*—

(1) *Place for filing.*—The notice referred to in subsection (a) shall be filed—

(A) *Under state laws.*—

(i) *Real property.*—In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; * * *

* * * * *

(B) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); * * *

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RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) *Policy*. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) *Publication*. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case,

and the news media, and shall be available to the public on the same basis an any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by an such court for any purpose.

(c) *Guidelines for Method of Disposition*.

(1) Published opinions:

Shall be filed in signed or per curiam form in appeals which

(1) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) *Disposition is to be by Order or Opinion.*

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.